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No. 07-562

In The

Supreme Court of the United States

ALTRIA GROUP, INC., *et al.*,

Petitioners,

v.

STEPHANIE GOOD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the nation's oldest and largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to the economic growth of the United States and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing in America's economic future and living standards.

The NAM does not condone deceptive conduct in any form or for any purpose. However, the NAM does seek reversal of the decision below, which holds that only a formally promulgated agency rule can preempt state laws of general application. If allowed to stand, the ruling below would subvert the functioning of a carefully crafted federal regulatory regime, thwarting the federal government's goal of maintaining a uniform national policy in the subject industry—with the likely result being the regulatory destabilization of a myriad of other industrial sectors under comprehensive federal regulation and oversight.

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[1] All parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

Many of the nation's manufacturers participating in federally regulated industries could be profoundly affected by a ruling affirming the decision of the court of appeals in any number of ways, not least of which would be the ability of them to rely upon the guidance of their respective federal regulators with certainty and with confidence—whether or not the regulator's position is expressed in a formally promulgated rule. Manufacturers need the assurance of the Court that in relying upon the guidance of federal regulators, they will not expose themselves to state law liability in different courts across the country.

SUMMARY OF ARGUMENT

The authority vested in the Federal Trade Commission and the extensive exercise of that authority in this industry preempt the state law deceptive trade practices claims before the Court. Federal agencies have the power to preempt state law by a variety of means; no formally promulgated rule is required. As a state law tort claim cannot survive federal preemption where it frustrates the purposes and objectives of federal law, the enforcement of state law deceptive trade practices statutes must yield not only to federal statutes and formally promulgated regulations, but also to less formal regulatory guidance, such as policy statements, enforcement actions, and consent orders, where the application of those state statutes would conflict with such regulatory guidance. Were it otherwise, federal objectives would be subordinated to varying and competing state interests—precisely

the result that the Supremacy Clause should prevent.

Born of a national mandate and the product of a singular moment in the regulatory history of our nation, the Federal Trade Commission ("FTC" or "Commission") was created to provide prospective guidance to businesses in any number of ways. FTC guidance beyond that set forth in formally promulgated rules thus is of exceptionally strong preemptive force. In passing the Federal Trade Commission Act of 1914, 15 U.S.C. § 41, *et seq.* ("FTC Act"), Congress assembled a federal body of experts that would have the flexibility to provide prospective guidance to American businesses. Congress amended the FTC Act in 1938 to empower the FTC to forestall deceptive acts and practices, and again in 1975 to increase its enforcement authority while simultaneously imposing more demanding rulemaking procedures than those applicable to other federal agencies under the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.* ("APA"). Despite making the procedures for promulgating trade regulation rules more burdensome to the FTC, Congress, at the same time, expressly preserved the authority of the FTC to provide regulatory guidance on deception in the marketplace other than by way of formal rule. Empowered with the express statutory authority to issue guidance on what is (and what is not) deceptive, the Commission has defined the meaning of deception under the FTC Act not in a formally promulgated rule, but, rather, in a policy statement. Given the FTC's historical mandate and statutory authority, the preemptive effect of FTC

regulation does not depend upon the form that the regulation takes.

The Labeling Act, 15 U.S.C. § 1331, *et seq.*, at once reflects a desire to subject this industry to a single, uniform set of federal standards in order to provide consistency in the marketplace and leaves the FTC with the authority to further that goal. As contemplated by the Act, the FTC provides the expertise to ensure that the purposes and objectives of the Act are fulfilled. In keeping with its crucial role as an expert and advisory body in the area of advertising and labeling, the FTC has guided this industry and maintained uniformity and consistency through a variety of means. Taken together, the Labeling Act and FTC regulation preempt state law causes of action that would intrude upon the FTC's ability to police this industry as it sees fit. Allowing the state law claims pressed here to countermand the FTC's guidance would place in the hands of generalist judges and jurors what Congress has intended be placed within the hands of an expert federal agency. The Commission's focus has been trained on this industry continually since the early days of its existence, and it has accepted that which is challenged here. The substance and the manner of the Commission's regulation of this industry cannot lightly be set aside.

While the national interests at stake are substantial, the parochial interests advanced are modest. Private enforcement of the Maine Unfair Trade Practices Act, 5 ME. REV. STAT. § 205, *et seq.* ("MUTPA"), furthers no "traditional police power" that would save it from preemption; the act is

entirely derivative of the FTC Act. Indeed, the FTC has been regulating this industry far longer than MUTPA has been in effect, as it was only enacted in 1969. The deceptive trade practices claim before the Court is not one that would supplement an otherwise consistent federal enforcement regime. Rather, it would be wholly at odds with federal law and, therefore, is far less deserving of preservation than were it otherwise. The FTC is empowered to police and punish practices that might violate its guidance; private enforcement is neither warranted, nor needed.

Amicus curiae respectfully submits that the decision of the court of appeals should be reversed.

ARGUMENT

THE AUTHORITY VESTED IN THE FEDERAL TRADE COMMISSION AND THE EXTENSIVE EXERCISE OF THAT AUTHORITY IN THIS INDUSTRY PREEMPT THE STATE LAW DECEPTIVE TRADE PRACTICES CLAIMS BEFORE THE COURT

I. FEDERAL REGULATORY GUIDANCE PREEMPTS STATE LAW DECEPTIVE TRADE PRACTICES CLAIMS THAT CONFLICT WITH FEDERAL POLICY

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). "[I]n Order to form a more perfect Union," the Framers made certain that federal law would be "the supreme Law of the Land;

. . . any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. CONST. preamble & art. VI, cl. 2; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824) (Marshall, C.J.); THE FEDERALIST No. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed. 1961). "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). State law conflicts with federal law where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872 (2000), including where it "penaliz[es] . . . conduct that Congress has . . . excluded from sanctions." *Crosby*, 530 U.S. at 378; *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Preemption is "compelled whether Congress' command is explicitly stated in [a] statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Federal agencies have the power to preempt state law by a variety of means; no formally promulgated rule is required. In fact, it would "stultify the administrative process," *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947), to deprive less formal regulatory guidance of its rightful preemptive force. Moreover, "[t]o insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." *Geier*, 529 U.S. at 872. As with federal regulations, which

have "no less pre-emptive effect than federal statutes," *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), less formal agency guidance "warrant[s] respect." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004). Regulatory guidance, which may come in any number of forms, such as policy statements, enforcement actions, and consent orders, reflects a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *accord Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Limiting preemption to formally promulgated rules ignores the fact that the Court has accorded deference "not only to agency regulations, but [also] to authoritative agency positions set forth in a variety of other formats." *Christensen v. Harris County*, 529 U.S. 576, 590 (2000) (Scalia, J., concurring) (citing cases).[2]

Federal agencies are not constrained to act only by way of formally promulgated rules because "any rigid requirement to that effect would make the administrative process inflexible and incapable of

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[2] *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (adjudication); *NationsBank of N. C., N. A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) (letter of Comptroller of the Currency); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 647-48 (1990) (decision by Pension Benefit Guaranty Corp. to restore pension benefit plan); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 978-79 (1986) (FDA's "longstanding interpretation of the statute" reflected in no-action notice).

dealing with many of the specialized problems which arise." *Chenery*, 332 U.S. at 202; *see also NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974); *Beltone Electronics Corp. v. FTC*, 402 F. Supp. 590, 602 (N.D. Ill. 1975). Indeed, flexibility in the manner of regulation is integral to the administrative process, for agencies "do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1457 (2007); *see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978).[3]

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[3] Informal agency actions "comprise around 90 percent of all administrative action." WILLIAM J. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 261 (4th ed. 2000). In enacting the APA, Congress deliberately "avoided codifying informal procedures." FOX, *supra*, at 265 n.12. The chair of the committee whose report resulted in the APA explained that doing so "would not be of service to the citizen; that it would not be of service to the Government and that it [would be] an entirely futile thing to do." *Hearing Before the Subcomm. on the Judiciary on S.674, S.675, and S.918*, 77th Cong., 1st Sess. 804 (1941) (statement of Dean Acheson).

Among its many forms,[4] preemptive regulatory guidance may stem from an adversarial proceeding. "[W]here a guideline is laid down in an individual case it is, like many common law rules, generally obeyed by those similarly situated." *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 685 (D.C. Cir. 1973). A consent order binding on one party thus serves not only to guide fellow market participants, but also to preempt state laws that would conflict with the federal policy advanced by the order. *See, e.g.*, *General Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990).

As "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute," *BMW v. Gore*, 517 U.S. 559, 573 n.17 (1996), a state law tort claim cannot survive federal preemption where it frustrates the purposes and objectives of federal law. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1020 (2008); *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 452 (2005);

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[4] *See, e.g.*, *Geier*, 529 U.S. at 869 (interpretive statements and history of agency oversight); *McDermott v. Wisconsin*, 228 U.S. 115, 127 (1913) (advisory letter); *Cellco P'ship v. Hatch*, 431 F.3d 1077, 1081 (8th Cir. 2005) (adjudication); *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1415-16 (4th Cir. 1994) (consent order); *General Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (consent order); *Alaska v. Dep't of Transp.*, 868 F.2d 441, 446 (D.C. Cir. 1989) (exemption orders); *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 23 (Cal. 2004) (letter order). Even an agency decision not to regulate may have preemptive effect. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002); *cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (non-enforcement is within the sole discretion of federal agencies).

Geier, 529 U.S. at 869; *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 227-28 (1995). This is especially so where "the subject matter is technical [and] the relevant history and background are complex and extensive," *Geier*, 529 U.S. at 883, as well as where the asserted claim would encroach upon "an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). In particular, state law deceptive trade practices claims that would have a "'significant' and adverse 'impact'" upon interstate commerce, such that enforcement could give rise to a "state regulatory patchwork," are preempted where a federal regulatory regime seeks to establish national uniformity and consistency. *Morales v. TWA*, 504 U.S. 374, 390 (1992) (quoted in *Rowe v. New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989, 995-96 (2008)).

II. FTC GUIDANCE OTHER THAN THAT SET FORTH IN FORMAL RULES CAN PREEMPT CONFLICTING STATE LAW

FTC guidance beyond that set forth in formally promulgated rules is of exceptionally strong preemptive force; the FTC was created to provide just such guidance to American businesses. The FTC is an independent agency with its own set of rulemaking procedures. It is specifically charged with the duty to provide guidance on deception in the marketplace beyond that which it promulgates in formal trade regulation rules. Indeed, it has defined "deception" within the meaning of the FTC Act in a policy statement. Given the FTC's historical mandate and statutory authority, any "legislative

rules vs. other action dichotomy," *EEOC v. ARAMCO*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring), is inapplicable to FTC guidance.

A. One of the Principal Reasons for the Existence of the FTC Is to Provide Regulatory Guidance

Congress created the Federal Trade Commission in the wake of the 1912 presidential campaign, in which candidates Taft, Wilson, and Roosevelt all ran on party platforms that sought to strengthen and redefine the federal government's role in regulating business. *See* Milton Handler, *The Constitutionality of Investigations of the Federal Trade Commission: I*, 28 COLUM. L. REV. 708, 724 (1928).[5] After winning election, President Wilson "proposed an investigatory and advisory agency" that would become the Federal Trade Commission. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 52 (2003). As the President implored Congress prior to its passing the FTC Act:

> [T]he business men of the country desire something more than that the menace of legal process in these

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[5] *See also National Petroleum*, 482 F.2d at 686 n.15; 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3703 (Earl W. Kintner ed. 1982); Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, 16 ANTITRUST 71 (Spring 2002); *see generally* JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY (2004).

> matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.

President Woodrow Wilson, *Address Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies*, H.R. Doc. No. 625, 63d Cong., 2d Sess. 3, 6 (Jan. 20, 1914), *reprinted in* Kintner, *supra*, at 3748. Just "[t]wo days later, in publicly declared consonance with this recommendation, identical proposals were presented in the House by Mr. Clayton . . . and in the Senate by Mr. Newlands." James A. Emery, National Ass'n of Manufacturers, *A Handbook of the Federal Trade Commission Act*, at 7 (1915) (FTC Library No. HD-2777.E6). The "concern over judicial delay, inefficiency and uncertainty was echoed time and again throughout the 1914 debates over the form a commission would take." *National Petroleum*, 482 F.2d at 689; *see also* Kintner, *supra*, at 3703-05; WILLIAM H.S. STEVENS, UNFAIR COMPETITION: A STUDY OF CERTAIN PRACTICES 1-2 (1917); Milton Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising*, 31 COLUM. L. REV. 527, 532-33 (1931). Ultimately, "[t]he FTC was created to Wilson's specifications." Winerman, *supra*, at 38.

As the President would confirm while running for reelection in 1916, the Commission was assembled in 1914 "to supply the business community, not merely with lawyers in the

Department of Justice who could cry, 'Stop!', but with men in such tribunals as the Federal Trade Commission, who could say, 'Go on,' who could warn where things were going wrong and assist instead of check." President Woodrow Wilson, *An Address to the Commercial Club of Omaha*, Oct. 5, 1916, *in* 38 THE PAPERS OF WOODROW WILSON 336, 341 (Arthur S. Link ed. 1982).[6] A memorandum filed with the Commission in only the third month of its existence reflects this understanding of the FTC's advisory role. *See* Minutes of the Federal Trade Commission, Apr. 28, 1915 (recording receipt of S.M. Strook & Wade H. Ellis, *In the Matter of the Power of the Federal Trade Commission to Give "Advice, Definite Guidance and Information" to Business Men* (Apr. 28, 1915) (FTC Rec. No. A-1384)). The memorandum reports that "the whole contemporaneous history of the passage of the [Federal] Trade Commission act establishes beyond question that its primary object was to afford to business men the opportunity to know in advance whether or not some contemplated business venture or some trade practice is going to be approved or disapproved." *Id.* at 19. Within the

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[6] President Wilson expressed similar sentiments throughout his 1916 reelection campaign. *See, e.g.*, Link, *supra*, at 129, 136 (explaining in his speech accepting the nomination that the creation of the FTC "relieved business men of unfounded fears" and "removed the barriers of misunderstanding" for manufacturers' enterprises); at 265 (observing that the FTC transformed the United States government from an "antagonist of business" into a "friend of business"); and at 478-79 (describing how the FTC's role is to "mediate between the law and business," thus providing businessmen with a "complete understanding" of the law).

first fifteen years of its existence, the Commission's reports providing American businesses with guidance would become "classics in the field of marketing." Milton Handler, *The Constitutionality of Investigations of the Federal Trade Commission: II*, 28 COLUM. L. REV. 905, 937 (1928).

With the powers granted by Congress, "then, as now, the agency combined formal powers to investigate . . . formal powers to prosecute . . . and informal authority to educate and work with business to facilitate compliance with the law (those [powers] emphasized by Wilson)." Winerman, *supra*, at 97. As this Court has recognized:

> [T]he language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service . . . free to exercise its judgment without the leave or hindrance of any other official or any department of the government.

Humphrey's Executor v. United States, 295 U.S. 602, 625-26 (1935). The FTC Act is "one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials and the flexibility of the administrative process." *United States v. Morton Salt Co.*, 338 U.S. 632, 640 (1950). The Commission's "members are called upon to exercise the trained judgment of a body of experts

appointed by law and informed by experience." *Humphrey's Executor*, 295 U.S. at 624.

"[W]holly apart from the question of rule-making power [the FTC] exerts a powerful[] regulatory effect on those business practices subject to its supervision." *National Petroleum*, 482 F.2d at 685. Federal courts and state authorities alike agree that FTC consent orders have preemptive effect where state law would conflict with the policies advanced in such orders. *See, e.g.*, *Abrams*, 897 F.2d at 39 (FTC consent orders reflecting a "reasonable policy choice of a federal agency and issued pursuant to a congressional grant of authority may preempt state legislation"); *In re Nutri-System L.P.*, No. 96-773, Conn. Dep't of Consumer Protection (Nov. 1, 1996) (following *Abrams* in holding that an FTC consent order preempted state enforcement against conduct that otherwise may have violated the Connecticut Unfair Trade Practices Act). Indeed, the FTC has maintained that its "exercise of *any authority* under the FTC Act may preempt state law when it conflicts with it." Brief of *Amicus Curiae* Federal Trade Commission at 6-7, *General Motors Corp. v. Abrams*, 703 F. Supp. 1103 (S.D.N.Y. 1989) (No. 86 Civ. 9193) (emphasis in original). As with other expert agencies, this view "warrant[s] respect." *Alaska Dep't*, 540 U.S. at 488.

B. The FTC Has the Power and Expertise to Police Deceptive Practices in the Marketplace

The FTC defines what is (and what is not) a deceptive trade practice. Congress amended the FTC Act in 1938 by passing the Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111, which endowed the Commission with the express power under Section 5 of the FTC Act to forestall "deceptive acts or practices." 15 U.S.C. § 45(a)(1); *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). In so doing, Congress made a fundamental policy judgment regarding the FTC's "expertise in dealing with commercial practices, its ability to act as a buffer in securing voluntary compliance through informal proceedings, and its sound discretion in determining when formal enforcement measures were necessary." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 995 (D.C. Cir. 1973). This Court has deferred to FTC guidance on deceptive practices, in recognition that the "Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." *FTC v. Mary Carter Paint Co.*, 382 U.S. 46, 48 (1965).

Congress confirmed the distinctive status of FTC guidance in this area when it passed the Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183, which once again amended the FTC Act to augment the Commission's powers, but, at the same time, imposed unique procedural constraints on the FTC's ability to formally promulgate trade regulation rules.

Unlike other agencies that are subject to the rulemaking procedures of the APA, the FTC has its own set of more elaborate rulemaking procedures to which it must adhere in promulgating rules. 15 U.S.C. § 57a. In putting in place the Commission's formal rulemaking procedures, however, Congress expressly reserved the FTC's "[a]uthority . . . to prescribe . . . general statements of policy with respect to . . . deceptive acts or practices." *Id.*, § 57a(a)(1)(A). While, to be sure, other federal agencies have the authority to issue policy statements under the APA, 5 U.S.C. § 553(b)(A), that the FTC power to do so was explicitly preserved, while, at the same time, its ability to promulgate rules was made more burdensome, confirms the significance of this power. Had Congress wanted to confine the FTC to regulate only by resort to its formally promulgated trade regulation rules, it would not have expressly preserved the Commission's power to provide regulatory guidance other than by formal rule in the 1975 Act. This express preservation of power "cannot be regarded as mere surplusage; it means something." *Potter v. United States*, 155 U.S. 438, 446 (1894) (quoted in *Carter v. United States*, 530 U.S. 255, 262 (2000)); *accord Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 233 (1947).

In furtherance of its statutory authority, the FTC has issued a policy statement defining what is "deception." *See* FTC POLICY STATEMENT ON DECEPTION, *in* Letter from James C. Miller III, Chairman of the FTC, to Hon. John D. Dingell, 4 Trade Reg. Rep. (CCH) ¶ 13,205 (Oct. 4, 1983) (appended to *In the Matter of Cliffdale Associates,*

Inc., 103 F.T.C. 110, 174 (1984)), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm. While not the product of any formal rulemaking procedure, the policy statement represents the considered and expert judgment of the Commission and has the full force and effect of federal law; it was "developed as an authoritative interpretation of deception" that has been followed by the FTC and by federal courts since its issuance nearly twenty-five years ago. ROBERT M. LANGER, ET AL., UNFAIR TRADE PRACTICES, § 2.3 (2003) (discussing policy statement and citing cases).

The FTC has a "broad mandate to prevent public deception in the give and take of the market place," and federal courts have "consistently upheld the Commission's efforts to compel manufacturers and retailers to adhere to a high level of honesty in connection with their labeling and advertising habits." *In the Matter of Colgate-Palmolive Co.*, 62 F.T.C. 1269, 1276 (1963). The FTC's guidance in this arena "serve[s] to inform the public and the bar of the interpretation which the Commission . . . will place upon advertisements using the words and phrases therein set out . . . . Only by consistent interpretation can some order be brought to the semantic jungle of advertising." *In the Matter of Gimbel Bros.*, 61 F.T.C. 1051, 1073 (1962). The "special competence of the Commission" in assessing deceptiveness is "for all practical purposes supreme." *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944). Given the FTC's mandate and statutory authority, the preemptive

effect of FTC regulation does not depend upon the form that it takes.

III. PREEMPTION OF THESE CLAIMS WOULD PROMOTE FEDERAL OBJECTIVES WITHOUT INTRUDING UPON ANY IMPORTANT STATE INTERESTS

The state law deceptive trade practices claims at issue would punish that which the federal government has accepted as part of a regulatory regime that seeks national uniformity and consistency. State laws presenting such conflicts with federal law have been preempted in numerous contexts, including: labeling bacon[7] and corn syrup;[8] manufacturing automobiles[9] and helicopters;[10] marketing medical devices,[11] pesticides[12] and alcohol;[13] operating tanker vessels,[14] airports[15] and

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[7] *Rath Packing*, 430 U.S. at 543.

[8] *McDermott v. Wisconsin*, 228 U.S. 115, 127 (1913).

[9] *Geier*, 529 U.S. at 883.

[10] *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512-13 (1988).

[11] *Riegel*, 128 S. Ct. at 1020.

[12] *Bates*, 544 U.S. at 452.

[13] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984).

[14] *Locke*, 529 U.S. at 117; *Ray v. ARCO*, 435 U.S. 151, 178 (1978).

[15] *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 627 (1973).

paper mills;[16] removing hazardous waste;[17] and engaging in corporate takeovers.[18] A "specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking," is not a prerequisite to federal supremacy, for any such requirement surely would "tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." *Geier*, 529 U.S. at 872. Regardless of the form in which the regulation is expressed, state laws of general application are preempted where competing state interests would frustrate federal objectives.[19] The Commission has guided this

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[16] *International Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987).

[17] *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109 (1992).

[18] *Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982). A majority of the Court decided *Edgar* on dormant Commerce Clause grounds, but, in cases such as this, the constitutional concerns are not dissimilar. *See, e.g.*, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) (striking down state labeling law that conflicted with the "Commerce Clause's overriding requirement of a national 'common market'").

[19] *See, e.g.*, *Geier*, 529 U.S. at 869 (interpretive statements and history of agency oversight); *McDermott*, 228 U.S. at 127 (advisory letter); *Cellco P'ship*, 431 F.3d at 1081 (adjudication); *Feikema*, 16 F.3d at 1415-16 (consent order); *Abrams*, 897 F.2d at 39; *Alaska v. DOT*, 868 F.2d at 446 (exemption orders); *Dowhal*, 88 P.3d at 23 (letter order); *cf. also Aguirre-Aguirre*, 526 U.S. at 425 (adjudication); *NationsBank*, 513 U.S. at 256-57 (letter of Comptroller of the Currency); *LTV Corp.*, 496 U.S. at 647-48 (decision by Pension Benefit Guaranty Corp. to restore pension benefit plan); *Young*, 476 U.S. at 978-79 (no-action notice).

industry by its policy statements, enforcement actions, consent orders, and other actions not articulated in formally promulgated trade regulation rules. In doing so, the Commission has furthered the purposes and objectives of federal law. The claims before the Court would have a significant and adverse impact on the substantial federal interests at stake. Preemption would promote federal policy without improperly intruding upon any fundamentally important state interests. The state law claims must yield.

A. FTC Regulation of this Industry Has Been Extensive

This industry has been heavily regulated by the FTC. This Court has recognized as much on more than one occasion, and so *amicus curiae* will not recount here the storied regulation of this sector; the record, as reported elsewhere, *e.g.*, Pet. Br. at 2-13, 46-54, speaks for itself. Suffice it to say, that from its infancy, the Commission has kept a watchful eye on the industry and continues to do so. The FTC's already trained focus on this industry and on the conduct at issue was sharpened by the enactment and amendment of the Labeling Act. With its expertise and authority to decide what is (and what is not) deceptive, the Commission has mandated the use of the FTC Method, considered and rejected proposals to modify or abandon the FTC Method, brought enforcement actions and entered into consent orders to ensure compliance with the FTC Method, and otherwise accepted the use of the descriptors at issue. Such guidance in its myriad of forms reflects a "body of experience and informed

judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. This is especially so since the FTC has "applied its position with consistency." *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1156 (2008).

While no formal rule mandating the descriptors in controversy was ever promulgated, to allow the state law claims at issue to proceed would grant private parties and state enforcers a "virtual power of review over the federal determination" that these trade practices are not deceptive. *Sperry v. Florida*, 373 U.S. 379, 385 (1963). It thus is "essential to the administration" of the Labeling Act and the FTC Act that these determinations be left to the Commission "if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). As with other agencies in other industries, "Congress has delegated to [the FTC] authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive." *Geier*, 529 U.S. at 883. "In these circumstances, the agency's own views should make a difference." *Id.*; *cf. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

B. The Claims Would Have an Adverse Impact on Federal Policy

The Labeling Act at once reflects a Congressional desire to subject this industry to a single, uniform set of federal standards, and leaves the FTC with the authority to further that goal. 15

U.S.C. § 1336. The FTC's well-established powers taken together with the Labeling Act's directive combine to create a powerful preemptive force. In keeping with its historically key role as an expert and advisory body, the FTC has guided the industry and maintained uniformity and consistency through a variety of means. The state law claims pressed here would have a significant and adverse impact upon this federal regulatory regime.

Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007), is instructive.[20] In *Billing*, the Court dismissed a private lawsuit in deference to a regulatory regime and agency—the SEC—vested with the authority and expertise to "distinguish what is forbidden from what is allowed . . . with confidence." 127 S. Ct. at 2395. The Court explained that a history of continuously exercised agency authority within the "heartland" of its mission displaces conflicting laws of general application where there is (i) a need for regulatory expertise to draw complex lines separating permitted from forbidden conduct, and (ii) a serious risk that generalist courts will produce inconsistent results, deterring practices allowed by expert regulators. *Id.* at 2396. Such is the case here.

Assessing and ensuring the propriety of the descriptors at issue is no mean feat and, as

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[20] Although *Billing* was an implied repeal case, it is nevertheless apt, for "[t]he question whether an Act of Congress has repealed an earlier federal statute is similar to the question whether it has pre-empted a state statute." *Branch v. Smith*, 538 U.S. 254, 285 (2003).

envisioned by Congress, is rightfully left to the discretion of the Commission—with respect to both substance and manner. By allowing the FTC to police the industry, Congress has asked the FTC to bring its "specialized experience to bear on the subtle questions in this case." *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). The FTC recognizes that when it comes to product labeling and advertising, too much information many times can be worse than too little. The Court has endorsed the FTC's considered view that the provision of certain truthful information may have the "paradoxical effect of stifling the information that consumers receive." *Morales*, 504 U.S. at 389-90. Regulating the use of the descriptors thus requires "the exercise of an informed, expert judgment." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613-14 (1946).

Through its guidance and oversight in this industry, the FTC has embraced the virtues of consistency and national uniformity, in keeping with the purposes and objectives of the Labeling Act. It has selected a variety of means by which to further its regulation of this industry; its judgment as to the manner in which it seeks to further federal policy can no more be second-guessed by the application of state law than can the substance of that policy. To place Congress' and the Commission's "regulatory regime in the shadow of 50 states' tort regimes," *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001), would frustrate the federal objective in achieving national uniformity and consistency, serving to deter practices accepted by the FTC. Successful enforcement of Maine's Little FTC Act,

MUTPA, surely would lead to the enforcement of CUTPA (Connecticut's Little FTC Act), and so on, and so on, across the entire nation. A deluge of such contrary requirements would have a "'significant' and adverse 'impact'" by undoubtedly producing a "state regulatory patchwork." *Rowe*, 128 S. Ct. at 995-96 (quoting *Morales*, 504 U.S. at 390); *see Billing*, 127 S. Ct. at 2395; *Riegel*, 128 S. Ct. at 1015; *Wolens*, 513 U.S. at 228. This would impermissibly encroach upon the FTC's "responsibility to police fraud consistently with [its] judgment and objectives." *Buckman*, 531 U.S. at 350. As with other such state laws in analogous contexts, the enforcement of MUTPA must yield to contrary federal policy. The application of state law here not only frustrates the federal objective in achieving uniformity and consistency, but also strikes at the heart of the FTC's ability to regulate deception in the marketplace.[21]

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[21] The savings clause contained within the FTC Act, 15 U.S.C. § 57(e), does not blunt the preemptive force of the FTC's guidance. While a clause such as this may preclude field preemption, it "does not bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869; *see also Dowhal*, 88 P.3d at 23; *compare American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 984 (D.C. Cir. 1985) (acknowledging FTC conflict preemption), *with Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 663 (2d Cir. 1979) (considering FTC field preemption).

C. Preemption Would Not Intrude Upon Important State Interests

While the national interests at stake are substantial, the parochial interests advanced are modest. No "field which the States have traditionally occupied," *Rice*, 331 U.S. at 230, is implicated by the private enforcement of MUTPA. The Maine law, like other such state laws, is derivative of the FTC Act—it would not exist without it. It tracks the language of the FTC Act and it purports to be "guided by the interpretations given by the Federal Trade Commission." 5 ME. REV. STAT., § 207. It thus does not represent any "historic police power." Indeed, the Commission has been regulating this industry far longer than MUTPA has been regulating anything; it was not enacted until 1969.

Nor is the MUTPA claim pressed here one that would supplement an otherwise consistent federal enforcement regime. If it were, it might be able to coexist with federal law. *See, e.g.*, *California v. ARC America Corp.*, 490 U.S. 93, 104-05 (1989); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984). In considering the relative importance of a state's interest, at issue is the "relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Rath Packing*, 430 U.S. at 526. And although it mimics the FTC Act in form, MUTPA sharply conflicts with federal law in substance. The claim, as it has been articulated, would call for an interpretation of substantive law that is wholly at odds with the interpretation and application of federal law by the FTC. Therefore, despite its facial similarity, the

statute, as applied, is far "less deserving of preservation," *Riegel*, 128 S. Ct. at 1008, than it would be if it were attempting to remedy conduct that actually violated FTC guidance. *Accord Bates*, 544 U.S. at 452-54.

Any concern that preemption might leave a remedial void is for Congress or the Commission to address. *See, e.g.*, *Bates*, 544 U.S. at 458. That a private remedy might be extinguished is neither surprising nor relevant, for preemption "will almost always leave the [alleged] state-law violation unredressed." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981). Preemption, however, would by no means provide the industry with "*carte blanche* to lie to and deceive consumers," *Morales*, 504 U.S. at 391; the FTC is empowered to police and punish practices that would violate its guidance. As with other federal agencies, it has enforcement mechanisms at its disposal that are by no means "toothless," *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008), making private enforcement neither warranted, nor needed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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